No. 85-732 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; AND OZARK AIR LINES, INC.
Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of South Dakota

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APPELLANTS' BRIEF

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QUESTION PRESENTED

Section 7(d) of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513(d)) forbids a state to assess or tax air carrier transportation property at ratios or rates higher than those imposed on other "commercial and industrial property" in the same jurisdiction. The Act defines "commercial and industrial property" to include property "devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. § 1513(d)(2)(D). Does this definition permit a state to escape § 1513(d)'s prohibition by wholly exempting most business property from taxation, while simultaneously imposing a tax on air carrier transportation property?

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OPINIONS BELOW

The opinion of the Supreme Court of South Dakota (Juris. St., App. A at 1a) is reported at 372 N.W.2d 106 (S.D. 1985).[1] The decision of the Circuit Court

[1] "Juris. St." refers to Appellants' jurisdictional statement. "J.A." refers to the Joint Appendix. The parties below are listed at J.A. 1-3. Plaintiffs included, in addition to the appellants here, Continental Airlines Corporation. The names of individual defendants, all of whom were sued only in their capacities as state or county officials, are not listed. *See infra*, A-18, for changes in corporate affiliations.

for the Sixth Judicial Circuit of South Dakota (Juris. St., App. B at 13a) is unreported.

JURISDICTION

The judgment of the Supreme Court of South Dakota (Juris. St., App. C at 22a), sustaining the validity of the South Dakota flight property tax (S.D. Codified Laws Ann. § 10-29 (1982)) against a challenge based on the Supremacy Clause (U.S. Const. art. VI, cl. 2) and laws of the United States (49 U.S.C. § 1513(d)), was entered on July 31, 1985. The notice of appeal to the Court (Juris. St., App. D at 23a) was filed with the South Dakota Supreme Court on October 9, 1985. Appellants' jurisdictional statement was filed with the Court on October 29, 1985. The Court noted probable jurisdiction on February 24, 1986. Jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Appendix A, *infra*, A-1 sets forth pertinent portions of the following:

A. Section 7(d) of the Airport Development Acceleration Act of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 1513(d).

B. South Dakota Codified Laws Annotated, §§ 10-4-6.1; 10-6-33; 10-6-34.1; 10-29-2; 10-29-8 (1982).

C. United States Constitution, article VI, clause 2 (the Supremacy Clause).

STATEMENT OF THE CASE

In the proceedings below, four interstate air carriers providing commercial air service to airports in South Dakota challenged discriminatory state property taxes as violative of § 7(d) of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513(d). This federal statute prohibits a state from assessing, levying or collecting property taxes that discriminate against interstate air carriers, declaring that such taxes are an unreasonable burden on interstate commerce. Under § 1513(d), discrimination exists when air carrier transportation property is assessed at a higher ratio or taxed at a higher rate than the average applied to other property in the same assessment jurisdiction "devoted to commercial or industrial use and subject to a property tax levy." § 1513(d)(2)(D).

The airlines alleged a violation of § 1513(d) because the state separately classified and taxed the flight property "of airline companies," while at the same time wholly exempting from taxation most of the state's other business personalty. The state argued that the tax was an "in lieu" tax, permissible under § 1513(d)(3).

The carriers' challenge ultimately was rejected by a divided South Dakota Supreme Court, which held that § 1513(d) did not preempt the state's flight property tax. The majority, discovering a rationale that not even the state had suggested, found that non-airline business personalty exempted by the state from taxation is not commercial and industrial property "subject to a property tax levy" under § 1513(d), and thus cannot be used for discriminatory ratio or rate

comparisons. This appeal challenges that interpretation of § 1513(d).

1. Operation of South Dakota's Flight Property Tax.

In 1961, South Dakota imposed upon the flight property "of airline companies" serving South Dakota a centrally assessed tax, *i.e.*, a tax assessed by the state's Department of Revenue, rather than by local county or city taxing authorities. 1961 S.D. Sess. Laws 449, S.D. Codified Laws Ann. §§ 10-29-2, -8 (1982). Each of the airlines' aircraft "fully equipped ready for flight used in interstate commerce" was valued at a percentage of its total value, the percentage being determined by the proportion of the airline's total operations (measured by flight time, revenue ton miles, and tonnage of passengers and freight received and discharged) conducted within the state. S.D. Codified Laws Ann. § 10-29-10 (1982). The aircraft so valued then were assessed at up to 60% and taxed at the average mill rate paid on all property, both real and personal, within the state. S.D. Codified Laws Ann. §§ 10-6-33, -29-14 (1982). The taxes so determined were allocated for collection to each county containing an airport served by the airline, and were to be used exclusively for such airports. S.D. Codified Laws Ann. § 10-29-15 (1982).[2]

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[2] By way of illustration, appellant Western Air Lines, Inc. ("Western") reported to the South Dakota Department of Revenue that during 1982 Western owned or leased forty-eight Boeing 727-200 aircraft with a total depreciated value of $244,287,355. App. B, *infra*, A-8. Western calculated that its operations within South Dakota generated 0.242% of the tonnage carried by these forty-eight aircraft during 1982; 0.082% of their hours flown; and 0.095% of their revenue ton miles. *Id.* at A-8. The state tax appraiser averaged these three percentages,

2. Origin of the Federal-State Conflict.

When the flight property tax was enacted in 1961, South Dakota also taxed other business-related personal property. These latter taxes were repealed in 1978. After that date, all personal property that was not centrally assessed was classified for *ad valorem* tax purposes and was exempted from taxation. S.D. Codified Laws Ann. § 10-4-6.1 (1982). However, the state retained central assessment and classification—and thus taxation—for "flight property of airline companies operating in the state." S.D. Codified Laws Ann. § 10-29-2 (1982).[3]

In 1982, the U.S. Congress determined that several specified taxing practices of the states "unreasonably burden and discriminate against interstate commerce," and amended the Airport Development Acceleration Act of 1973 to forbid such practices. 49

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applied the resulting factor of 0.140% to the aircraft's depreciated value, and thereby valued these forty-eight aircraft for tax purposes at $342,000. *Id.* at A-10. A similar set of calculations applied a factor of 6.392% to the $37,859,921 depreciated value of fourteen Boeing 737-200 aircraft owned or leased by Western, yielding a taxable value of $2,420,000. *Id.*

The resulting total $2,762,008 of Western flight property was assessed at $1,432,772, or 51.9%. The assessed value was taxed at an average mill rate of 54.35. *Id.* at A-14, A-15. Western's 1983 South Dakota property taxes thus were computed to be $77,871. The total in 1983 for all air carriers was $194,455. *Id.* at A-15. This amount was allocated for collection among the nine different counties served by the airlines. *Id.* at A-17.

[3] Central assessment was also retained for public service companies, such as railroads, telephone and telegraph companies, electric utilities and pipeline companies. S.D. Codified Laws Ann. §§ 10-6-34.1, -28-1, -33-10, -34-8, -35-2, -37-9 (1982).

U.S.C. § 1513(d).[4] This 1982 amendment prohibited the states from assessing "air carrier transportation property" at a higher proportion of market value than the assessment ratio applied to "other commercial and industrial property of the same type in the same assessment jurisdiction," or from levying or collecting a tax based on such a discriminatory assessment. The states also were forbidden to levy or collect an *ad valorem* property tax at a rate exceeding that applicable to commercial and industrial property. 49 U.S.C. § 1513(d)(1); App. A, *infra*, at A-1. It is undisputed that the flight property taxed by South Dakota falls within § 1513(d)'s definition of "air carrier transportation property."

3. Lower Court Proceedings.

Based on this newly enacted federal statute, each of the four appellant airlines in May 1983 paid under protest its property taxes levied for the first six months of 1983. *See* S.D. Codified Laws Ann. § 10-27-2 (1982). They then sued the appropriate county treasurers for a refund.[5] The county's answer in each

[4] This amendment, adding subsection (d) to section 7 of the Act, Pub. L. No. 93-44, § 7, 87 Stat. 90 (codified as amended at 49 U.S.C. § 1513(d) (1976 & Supp. 1986)), was enacted as § 532 of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671, 701 (codified at 49 U.S.C. § 1513(d) (Supp. 1986)).

[5] The Joint Appendix includes, as representative of these fifteen actions, the complaint and answer in Western Air Lines, Inc. v. Hughes County Treasurer, No. 83-157 (S.D. Cir. Ct. filed May 27, 1983). J.A. 6. Each complaint alleged that the defendant county had "attempted to levy and collect tax upon Plaintiffs' air carrier transportation property, and to treat the same differently than similar property which is otherwise exempt

case (1) admitted payment of the taxes and the tax-exempt classification of non-centrally assessed property; (2) denied any violation of § 1513(d); and (3) alleged that the disputed tax "is utilized wholly for airport and aeronautical purposes and is in lieu of property taxes and is therefore permitted by 49 U.S.C. § 1513(d)(3)." J.A. 10-11.

In April 1983, each airline also requested the board of commissioners of each of seven counties to abate and refund property taxes collected after September 3, 1982—the effective date of the federal statute. J.A. 17; *see* S.D. Codified Laws Ann. § 10-18-5, -8 (1982). The denial of these requests led to another series of lawsuits, naming the county commissioners as defendants and seeking abatement and refund of the taxes paid.[6]

Finally, each of the four airlines also appealed its property tax assessment to the South Dakota State Board of Equalization, asserting that § 1513(d) "specifically restricts the State of South Dakota . . . from assessing, levying and collecting the tax sought to be imposed." J.A. 26; *see* S.D. Codified Laws Ann. § 10-29-12 (1982). The Board of Equalization unanimously denied the airlines' appeals. J.A. 29. Acting on the advice of its attorney (J.A. 29), the Board concluded that "the airline flight property tax is in lieu of personal property tax and is totally utilized for airport

from taxation pursuant to the South Dakota statute, thereby violating the federal statutes [49 U.S.C. § 1513]." J.A. 8.

[6] The Joint Appendix includes, as representative of these actions, the complaint and notice of appeal in Western Air Lines, Inc. v. Hughes County, South Dakota, and Its Board of Commissioners, No. 83-222 (S.D. Cir. Ct. filed August 4, 1983). J.A. 13, 23.

and aeronautical purposes, therefore, in conformity with Section 1513(d)(3), this tax is lawful and not a violation of federal law." J.A. 31. The four airlines appealed the Board's denials to the appropriate circuit courts, contending that § 1513(d) "specifically restricts the State of South Dakota and the various local governments from assessing, levying, and collecting the tax sought to be imposed." J.A. 33.[7]

The forty-two cases generated by this controversy all were consolidated in the Circuit Court for the Sixth Judicial Circuit in Hughes County, South Dakota. J.A. 44.[8] In February 1984, the circuit court issued a single memorandum decision disposing of these cases. Juris. St., App. B at 13a. The circuit court believed itself "not required to delve into the issue of whether this tax is burdensome or discriminatory." *Id.* at 21a. Instead, the circuit court sustained the state's tax as an "in lieu" tax of the type permitted under the federal statute. *Id.* at 20a.

4. Opinion of the South Dakota Supreme Court.

On appeal, a divided South Dakota Supreme Court affirmed the circuit court's judgment, but on a different basis. The court unanimously held that the circuit court had erred in sustaining the flight property

[7] The Joint Appendix includes, as representative of these proceedings, the certified record of the Board of Equalization and the notice of appeal to the circuit court in In re Western Air Lines, Inc., No. 83-343 (S.D. Cir. Ct. filed August 31, 1983). J.A. 24. A twelfth appeal was filed by Continental Airlines, who is not a party in the Court. *See* J.A. 4.

[8] In November 1983, a stipulated order applied the outcome of these cases also to taxes due in the second six months of 1983 and to all future flight property taxes. J.A. 34, 37.

tax as an "in lieu" tax.[9] *Western Air Lines, Inc. v. Hughes County,* 372 N.W.2d 106, 109-111 (S.D. 1985) ("*Western Air Lines*"); Juris. St., App. A at 5a-6a, 9a. While not denying the tax's discriminatory effect, the supreme court nonetheless upheld the tax, concluding in essence that while the law prohibits partial, it permits total, property tax discrimination against air carriers.

Section 1513(d)(2)(D) defines "commercial and industrial property" as property "devoted to commercial or industrial use *and subject to a property tax levy*" (emphasis added). Because the state exempted from taxation non-centrally assessed business property (S.D. Codified Laws Ann. § 10-4-6.1 (1982)), the court reasoned that this property was not "subject to a property tax levy," and therefore was not "commercial and industrial property" within the meaning of § 1513(d). *Western Air Lines,* 372 N.W.2d at 110; Juris. St., App. A at 7a. Thus the court held that § 1513(d) precluded consideration of this tax-exempt property for discriminatory ratio or rate comparison. This theory had not been advanced by the state or considered by the trial court.

The dissenting judge criticized the majority's opinion as "unreasonable," permitting as it does a

[9] The supreme court defined the term "in lieu tax" to be a tax that is instead of, or is a substitute for, another tax, and is not an additional tax. It found the South Dakota tax to be the first imposition of personal property tax on the flight property, and not a substitute for an *ad valorem* personal property tax. Western Air Lines, Inc. v. Hughes County, 372 N.W.2d 106, 109; Juris. St., App. A at 1a, 5a-6a. *Accord,* Northwest Airlines, Inc. v. State Bd. of Equalization, 358 N.W.2d 515, 518 (N.D. 1984).

"greater discrimination when the [commercial and industrial] property is completely exempt than when it is taxed, but at a lower rate." *Western Air Lines,* 372 N.W.2d at 112 (Henderson J., dissenting). He agreed fully with the contrary result reached by the North Dakota Supreme Court in *Northwest Airlines, Inc. v. State Bd. of Equalization,* 358 N.W.2d 515 (N.D. 1984). Citing *Aloha Airlines, Inc. v. Director of Taxation,* 464 U.S. 7, 10, n.3 (1983) ("*Aloha*"), Judge Henderson emphasized that "Congress' intent in enacting § 1513(d) was 'to prohibit discriminatory property taxes imposed on air carriers.' " He viewed the majority's opinion as "ludicrous and absurd," and noted that "a construction that accords with reason is to be preferred to a literal construction involving a palpable absurdity." *Western Air Lines,* 372 N.W.2d at 112 (citations omitted); Juris. St., App. A at 11a. Section 1513(d) required, in the dissenting judge's opinion, that "since the level of assessment on commercial and industrial property is zero, the level of assessment on the airlines' personal property must be reduced to zero." *Id.*

The four airlines filed a notice of appeal on October 9, 1985, invoking the Court's jurisdiction under 28 U.S.C. § 1257(2). Juris. St., App. D at 23a. After considering the airlines' jurisdictional statement and the state's response, the Court, on February 24, 1986, noted probable jurisdiction.

SUMMARY OF ARGUMENT

The purpose of § 7(d) of the Airport Development Acceleration Act (49 U.S.C. § 1513(d)) is to forbid the states from imposing discriminatory taxes on the transportation property of interstate airlines. Ignoring this purpose and the voluminous legislative history which confirms it, the contrary opinion of the North Dakota Supreme Court, and this Court's opinion in *Aloha,* 464 U.S. 7, the South Dakota Supreme Court construed the phrase "subject to a property tax levy" to produce a result patently inconsistent with Congress' intent.

It is undisputed that § 1513(d) would prohibit South Dakota from lowering the assessment ratio or tax rate applied to other commercial and industrial property without also lowering the assessment ratio or tax rate applied to air carrier transportation property. But the South Dakota Supreme Court held that if a state lowers the assessment ratio or the tax rate for other commercial and industrial property to zero by exempting that property from all taxation, then no corresponding reduction need be made in the tax on air carrier transportation property. According to the South Dakota court, property labeled by the state as "exempt" completely disappears from the comparison class against which air carrier transportation property must be measured because such exempt property is not "subject to a property tax levy" within the meaning of § 1513(d).

The phrase "subject to a property tax levy" is susceptible of conflicting interpretations. The South Dakota court had an obligation to construe that phrase consistently with the statute's purpose. The legislative history of § 1513(d) makes clear that these words were not intended to permit the wholesale exclusion of commercial and industrial property from the comparison class. Rather, the phrase was intended to exclude only property traditionally exempt from state taxation, such as property for government or charitable

use. Neither the legislative history nor common sense supports the reading given by the South Dakota court.

ARGUMENT

The airline appellants contend that the South Dakota flight property tax violates § 1513(d) because it: (1) assesses airline flight property at a higher ratio than the average for other commercial and industrial property in the state in violation of § 1513(d)(1)(A); (2) imposes a tax based on that assessment in violation of § 1513(d)(1)(B); and (3) imposes a tax rate on such property which is higher than the average for other commercial and industrial property in the state in violation of § 1513(d)(1)(C).

The South Dakota Supreme Court rejected the airlines' contention essentially in two sentences:

> Commercial and industrial property as used in [§ 1513(d)(1)] (A) and (C) is defined to mean property, other than transportation property and land used for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy*. 49 U.S.C. § 1513(d)(2)(D). The locally assessed personal property, being exempt from property tax levy, cannot be included as commercial or industrial property for comparison under either (A) or (C). (Emphasis in original.)

Western Air Lines, 372 N.W.2d at 110; Juris. St., App. A at 7a.

In reaching this conclusion about the meaning of "subject to a property tax levy", a conclusion described by the dissenting judge as a "palpable absurdity," (372 N.W.2d at 112; Juris. St., App. A at 11a), the South Dakota court did not examine the purpose of the statute, preferring instead to rely on an Eighth Circuit opinion which held a state tax *invalid* under a provision which has no counterpart in § 1513(d). In so doing, the South Dakota court ignored the Court's repeated admonition to appraise "the purpose as a whole of Congress in analyzing the meaning of clauses or sections . . ." *United States v. American Trucking Assoc.,* 310 U.S. 534, 544, *reh'g denied,* 311 U.S. 724 (1940); *United States v. Morton,* 467 U.S. 822 (1984). As recently as last term, the Court noted that "the overall purpose of the statute is a useful referent when trying to decipher ambiguous statutory language . . ." *Exxon Corp. v. Hunt,* 54 U.S.L.W. 4249, 4254 (1986).

In selecting one of several possible interpretations of the phrase "subject to a property tax levy,"[10] the South Dakota court should have recognized, as this Court already has done, that § 1513(d) was intended "to prohibit discriminatory property taxes imposed on air carriers." *Aloha,* 464 U.S. at 10, n.3 (1983). The North Dakota Supreme Court did just that, specifically rejecting the interpretation later adopted by the South Dakota court as leading to "ludicrous and absurd results." *Northwest Airlines, Inc. v. State Bd. of Equalization,* 358 N.W.2d 515, 517 (N.D. 1984).

Had the South Dakota court paid even the slightest attention to the legislative history of § 1513(d) and

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[10] Property "subject to" a tax levy could refer, for example, to all property that the states had the power to tax. Or it could refer to all property except that traditionally exempted by the states from taxation when Congress was considering the legislation. *See* part II, *infra,* pp. 21-26.

its predecessor statutes, that court would have discovered that Congress intended to equalize the taxes on property of airlines with those of all other owners of business property, and that Congress intended to prohibit the precise discrimination practices against carrier property engaged in by South Dakota. That legislative history also shows that the statutory phrase "subject to a property tax levy," was not intended to allow the sort of wholesale discrimination practiced by South Dakota, but rather to allow for exclusion from the comparison class of "commercial and industrial property" only those limited classes of property which had traditionally been exempt from state taxation.

I. The Purpose Of Section 1513(d) Is To Prohibit State Discrimination Against Air Carrier Transportation Property As Compared To Other Business Property. This Is Precisely The Discrimination Embodied In South Dakota's Statutes.

In enacting § 1513(d), Congress expressed its intent and the statute's purpose in clear, unequivocal language, declaring that certain specified practices "unreasonably burden and discriminate against interstate commerce and a State . . . may not do any of them." § 1513(d)(1).

Section 1513(d)'s extensive legislative history shows an overwhelming congressional intent to prohibit tax discrimination against interstate carriers, and a specific intent to prohibit exactly the kind of discrimination now practiced by South Dakota. The statute was modeled on § 31(a) of the Motor Carrier Act of 1980, which prohibited discriminatory state taxation of motor carrier property as compared to other commercial and industrial property.[11] The Committee reports make clear that § 1513(d) was intended to make applicable to air carriers the prohibitions of § 31(a).[12] The Motor Carrier Act in turn followed almost verbatim the language of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act").[13] The definitional section at issue before the Court is identical in all three statutes.

Section 306's legislative history shows that congressional concern about discriminatory state property taxes began as early as 1944, provoked primarily by the increasingly heavy tax burden borne by the railroads, and the resulting added costs to consumers.[14]

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[11] Pub. L. No. 96-296, § 31(a)(1), 94 Stat. 823, (codified as amended at 49 U.S.C. § 11503(a) (Supp. 1985), *amended by* the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96 Stat. 1122 (codified at 49 U.S.C. § 11503(a) (Supp. 1985)). *See also* H.R. Rep. No. 1069, 96th Cong., 2d Sess. *reprinted in* 1980 U.S. Code Cong. & Ad. News 2327.

[12] H.R. Rep. No. 760, 97th Cong., 2d Sess. 722 reprinted in 1982 U.S. Code Cong. & Ad. News, 1190, 1484.

[13] Pub. L. No. 94-210,§ 306, 90 Stat. 31, 54, (as re-codified at 49 U.S.C. 11503 (Supp. 1985)). Section 306 of the 4-R Act was originally codified at 49 U.S.C. § 26(c) (1976), but in the three years between the law's enactment and its effective date, the statute was recodified by the Revised Interstate Commerce Act of 1978, Pub. L. 95-473, § 11503, 92 Stat. 1337, 1445, and is now found at 49 U.S.C. § 11503 (Supp. 1985). Differences between the original § 306 and its recodification in 49 U.S.C. § 11503 were not intended to affect its meaning. Pub. L. No. 95-473, 92 Stat. 1337 (1978). *See also* Atchison, T. & S. F. Ry. Co. v. Lennen, 640 F.2d 255 (10th Cir. 1981).

[14] *See* House Document 160, September 19, 1944, "Letter From Board Of Investigation and Research Transmitting A Report On Carrier Taxation", pp. 124-25: "The officials of approximately

In 1959-60, Senate Resolutions 29, 151 and 244 of the 86th Congress ordered a special study group to prepare and submit a national transportation policy report, to include recommendations on means to eliminate state and local discriminatory taxation of various common carriers.

The resulting study, called the "Doyle Report," S. Rep. No. 445, 87th Cong., 1st Sess. (1961), found that, despite state laws requiring uniform tax treatment, common carrier property was discriminated against as compared to other business property in the same jurisdiction. The Report noted the "studied and deliberate practice" of assessing railroad property at a proportion of full value "substantially higher" than other similar business property. S. Rep. No. 445, *supra*, at 458. Among its recommendations, the Doyle Report endorsed a new proposal offered by the Association of American Railroads ("AAR") designed to ensure that common carriers "are accorded equal tax treatment." *Id.* at 466.[15]

The AAR proposal triggered the introduction during the next seven Congresses of various bills, predecessors of 306, designed to prohibit, as an

half the states readily concede that railroads are being overtaxed because of inadequate equalization", quoted in S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); S. Rep. No. 630, 91st Cong., 1st Sess. 4 (1969).

[15] The Report noted that passage of such an antidiscrimination tax provision for all interstate common carriers would be a "significant measure" in the relief of unduly burdensome state taxes on interstate commerce, and "would mark that assumption of control by Congress in the field of taxation of interstate commerce so vital to unhampered commerce between the States." S. Rep. No. 445, *supra*, at 466.

unreasonable burden upon interstate commerce, discriminatory state assessment and taxation of common carrier property.[16] Committee reports from Congresses prior to the 94th, when § 306 was enacted, make clear that these bills were intended to terminate the "widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property in the same taxing district." *See, e.g.*, S. Rep. No. 630, 91st Cong., 1st Sess. 17, 18 (1969).[17]

[16] Although the 4-R Act was passed four years before the Motor Carrier Act, initial congressional analysis focused on interstate carriers in general and was not limited to the railroads. For early consideration, *see, e.g.*, H.R. 7421, 87th Cong., 1st Sess., 107 Cong. Rec. 9375 (1961); *Tax Assessments on Common Carrier Property, Hearing on H.R. 736 before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. (1964); *Tax Assessments on Common Carrier Property, Hearings on H.R. 4972 before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. (1966); *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. (1967) "(*1967 Hearings*)"; S. 927, 90th Cong., 1st Sess., 113 Cong. Rec. 1887 (1967); S. 2289, 91st Cong., 1st Sess., 115 Cong. Rec. 14333 (1969). Courts have relied extensively on 306's predecessor bills. "The legislative history of these prior bills provides greater insight into Congress' intent in passing [49 U.S.C.] § 11503"; the courts thus properly may "rely on the legislative histories of these prior bills . . . in interpreting § 11503." Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 865, n.6 (9th Cir. 1983), *cert. denied*, 464 U.S. 846 (1983). *Accord*, Arizona v. Atchison T. & S. F. Ry. Co., 656 F.2d 398, 404, n.6 (9th Cir. 1981); Burlington N. R.R. Co. v. Lennen, 715 F.2d 494, 497 (9th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984); Atchison T. & S. F. Ry. Co. v. Lennen, 732 F.2d 1495, 1497, n.1 (10th Cir. 1984).

[17] Relying on the Doyle Report's findings, the Senate Com-

The legislative history also shows that Congress intended specifically to prohibit the practices now engaged in by South Dakota. As early as 1968, the Senate Commerce Committee expressed its intention to outlaw the growing practice of "classifying carrier property in a separate class from all other taxable property in the same district,"[18] a practice that could

merce Committee noted that "Unfortunately, interstate carriers, especially railroads, are easy prey for state and local tax assessors. Railroads . . ., and other interstate carriers are nonvoting, often nonresident, targets for local taxation." S. Rep. No. 1483, *supra* note 14, at 2 (1968); S. Rep. No. 630, *supra* p. 17, at 1.

[18] S. Rep. No. 1483, *supra* note 14, at 7; S. Rep. No. 630, *supra* p. 17, at 17, 18. The Committee's concern arose because the imposition of such classifications, and the resulting discriminatory taxes, often followed a successful court action by railroads or other carriers affording relief from discriminatory tax assessment practices. The Committee noted that:

> For example, in 1965 the Kentucky Court of Appeals held that all assessment should be at 100 percent of value. Prior to that time railroads and utilities had been assessed at a higher proportion of value than the proportion of value at which other property was assessed. Shortly after the decision was handed down, the committee was advised that the Governor of Kentucky called the general assembly into special session, and implementing legislation was enacted to match the sharply increased assessment valuation. However in order to insure that the State would continue to be able to collect higher discriminatory taxes from railroads and utilities, a bill was enacted which 'classified' railroads and utilities at a higher effective rate that [sic] the rate applicable to other property.
>
> Within the last year, the committee was advised measures designed to classify railroads and public utilities at different and higher tax rates have been introduced or considered in the following states: Alabama, Arizona, California, Kansas,

not be remedied except by Congressional action.[19] The Committee noted that "an ominous trend is the consideration being given by more and more states to the utilization of classification, that is, higher tax rates on transportation and utility company property, as the most effective means of perpetuating tax discrimination." S. Rep. No. 1483, *supra* note 14, at 5.[20] The Committee thus expressly condemned state attempts to classify carrier property separately from other business property and thereby to tax it at a higher rate, and bills thereafter reported by the Committee prohibited discriminatory rates as well as assessment practices. *See, e.g.*, S. Rep. No. 1483, *supra* note 14, at 7; S. Rep. No. 630, *supra* p. 17, at 8.[21]

Montana, Tennessee, and Utah.

S. Rep. No. 1483, *supra* note 14, at 5.

[19] Unlike the problem of discriminatory assessments or valuations, some of which had been struck down by the courts, there were at the time no cases limiting the power of state and local authorities to impose discriminatory taxes when state law so permitted. *See* S. Rep. No. 630, *supra* p. 17, at 17-18, and cases there cited. Indeed, in Nashville, C. & S. L. Ry. v. Browning, 310 U.S. 362 (1940), the Court had ruled that such discriminatory classification did not violate the Equal Protection Clause of the Fourteenth Amendment.

[20] One example called to the Senate Committee's attention was a proposal then pending in Alabama to classify and tax railroads and utilities at 40 percent, while other commercial and industrial property was taxed at only 25 percent. *1967 Hearings, supra* note 16, at 14, 38.

[21] The Senate Committee made clear, however, that it did not intend to abrogate the right of a state to classify property for rate purposes according to the traditional breakdowns of real property, tangible personal property and intangible personal property, provided there is no discrimination within these classes

This specific intent and the statute's broad purpose were reaffirmed by the 94th Congress, which finally enacted § 306 to "prohibit states and localities from imposing discriminatory taxes on the transportation property of railroads." H. R. Rep. No. 725, 94th Cong., 1st Sess. 76 (1975).

These objectives were underscored by the actions of the Conference Committee. The bill reported by the Senate Committee in the 94th Congress, while similar to the House bill in its key provisions, contained language that made it inapplicable to any state which then had in effect a constitutional provision for the reasonable classification of property. The Conference Committee specifically rejected such an exception to the bill's antidiscriminatory purpose.[22]

Congress prohibited the same forms of discrimination against air carrier property in enacting § 1513(d). As noted, § 1513(d) copied in pertinent part the language of § 306. The record shows that Congress was reacting to complaints by the airlines about discriminatory taxation similar to those previously voiced by the railroads and motor carriers. The President of the Air Transport Association ("ATA"), in proposing § 1513(d), noted that four states had adopted constitutional amendments under which "airline property has been classified as property of utilities and taxed at a rate which is higher than that applied to other business and commercial property." *Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st Sess. 216-17 (1981). ATA urged that the provisions of the 4-R Act and the Motor Carrier Act[23] prohibiting this form of discrimination against the transportation property of railroads and motor carriers be extended to airline property. Congress responded by enacting § 1513(d).

of property. S. Rep. No. 1483, *supra* note 14, at 11; S. Rep. No. 630, *supra* p. 17, at 11.

[22] S. Rep. No. 585, 94th Cong., 1st Sess. 166 (1975); S. Rep. No. 595, 94th Cong., 2d Sess. 13 (1976). *See also*: H.R. Rep. No. 725, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 781, 94th Cong., 2d Sess. 138-39 (1976). This was the second unsuccessful attempt by the Senate to accommodate such an amendment to the Constitution of Tennessee. In 1972, the Senate adopted a bill (S. 3945, which would have allowed state constitutional provisions classifying real property owned by a railroad or public utility for assessment at a higher proportion of its value than other industrial and commercial property. *See* S. Rep. No. 1085, 92d Cong., 2d Sess. 6-7 (1972).

II. The South Dakota Court Erred In Failing To Construe The Words "Subject To A Property Tax Levy" Consistently With The Statute's Purpose. The Phrase Was Intended To Permit Exclusion From The Comparison Class Only Of Limited Types Of Property Traditionally Exempt From State Taxation.

Although the South Dakota court's opinion turned entirely on the meaning of the phrase "subject to a property tax levy", the court failed to explore Congress' reasons for including that language in § 1513(d). Had the court done so, it could not possibly have ascribed to the phrase such a profound meaning.

[23] Proponents of § 31(a) of the Motor Carrier Act testified that the legislation would "prevent state or local governments from assessing or taxing transportation property of ICC regulated bus lines on a discriminatory basis, as compared to other business property . . . ." *Deregulation of the Intercity Bus Industry: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 97th Cong., 2d Sess. 218 (1982).

The legislative history of the phrase in § 1513(d) leads again to the statute's lineal ancestor, § 306 of 4-R Act. That history begins with the proposal sponsored by the AAR and described in the Doyle Report which would have prohibited assessment of common carrier property at a higher ratio than that applicable to "all other property in the taxing district *subject to the same property tax levy.*"[24] This language later appeared in bills introduced in both the 88th and 89th Congresses, *e.g.*, H.R. 736 (88th Cong.), H.R. 4972 (89th Cong.), and S. 2289 (89th Cong.).

Subsequently, in a bill (S. 927) considered by the Senate in the 90th Congress, the words "the same" were dropped without explanation, so that the phrase read "subject to a property tax levy." At the same time, a new provision prohibiting discriminatory tax rates was added.[25] Although the words "subject to a property tax levy" remained in the bill's prohibition of discriminatory assessments, they were not included in the prohibition addressing discriminatory tax rates. Nevertheless, in referring to the new provision, which used as the comparison class "any other property in the taxing district," the committee report stated:

> The phrase 'any other property in the taxing district' is not intended to interfere or restrict State action in extending total or partial exemption to property of a class, such as churches, charitable institutions, homesteads, and the like. In other words, property totally or partially exempted is not intended

[24] S. Rep. No. 445, *supra* p. 16, at 465 (Emphasis added).

[25] Such a provision appears in 49 U.S.C. § 1513(d)(1)(C).

> to be taken as a measure of "any other property" for tax rate purposes.[26]

Subsequent versions of bills considered in the 91st, 92nd and 93rd Congresses continued to use the term "subject to a property tax levy" solely in connection with the prohibition on discriminatory assessments.[27] During this period the description of property used as the comparison class changed from "all other property", to "all other commercial and industrial property" and a definition of the latter term was included. The change had been proposed by the Department of Transportation during the 90th Congress, and was intended to make clear that states would retain some latitude in classifying property "*unrelated* to business or commercial use." S. Rep. No. 630, *supra*, p. 17, at 24 (emphasis added).

In the 94th Congress, the bill passed by the House (H.R. 10979), followed the pattern of earlier bills with respect to the term "subject to a property tax levy." However, a bill introduced by the Chairman of the Senate Commerce Committee (S. 2265) shifted the words "subject to a property tax levy" from the as-

[26] S. Rep. No. 1483, *supra* note 14, at 11. The Committee report adopted almost verbatim the testimony of an AAR witness:

> Furthermore, it is our understanding that subsection (c) of the bill is not intended to interfere with or restrict State action in extending total or partial exemption to property of any class, such as churches, charitable institutions, homesteads, and the like.

1967 Hearings, supra note 16, at 82.

[27] *See, e.g.*, H.R. 16281, 92d Cong., 2d Sess. (1972); S. 927, 92d Cong., 2d Sess. (1972); S. 1891, 93d Cong., 1st Sess. (1973).

sessment prohibition to the definition of "commercial and industrial property." As defined, "commercial & industrial property" established the comparison class for tax rate as well as assessment purposes. The bill reported by the Senate Committee, the comprehensive 4-R Act (S. 2718), followed the same approach. The Senate provisions on discriminatory taxation were adopted by the Conference Committee, except for the provision permitting discrimination embodied in state constitutions. The shift of the term "subject to a property tax levy" to the definitional section was retained in the enacted version. None of the hearings, committee reports or debates concerning either the Senate or House bills in the 94th Congress discuss the term "subject to a property tax levy" or the reason for shifting it to the definitional section of the bill.

This history, and the other circumstances surrounding adoption of the phrase "subject to a property tax levy," indicate that, at most, it was intended to exclude property of a special and limited class which the states had traditionally exempted from taxation. The Doyle Report described these categories of property in some detail. Essentially they were: (1) government-owned property; (2) exemptions "applicable to the property of various improvement organizations, fraternal societies, business or professional associations, housing projects, municipally-owned utilities, etc."; and (3) "judicial" or "charter" exemptions such as extended to railroad rights of way. S. Rep. No. 445, *supra* p. 16, at 452. There is no reference to the kind of blanket exclusions from taxation such as later adopted by South Dakota. Indeed, from all that appears, such exclusions were unknown at the time the phrase found its way into pending bills.[28] Viewed

[28] On several occasions, testimony was presented to the Senate Commerce Committee on the extent of discriminatory taxation by the states. Among the examples listed, none showed sweeping tax exemptions for non-carrier business property. *See, e.g.*, S. Rep. No. 1483, *supra* note 14, at 4; S. Rep. No. 630, *supra* p. 17, at 5.

in this context, use of the phrase "subject to a property tax levy" to exclude *limited classes* of traditionally exempt property from the comparison class achieved a rational purpose which was also consistent with the basic purpose of the statute.[29]

This view is supported by the approach taken when the proposed legislation was enlarged in the 90th Congress to prohibit discriminatory tax rates as well as discriminatory assessments. The National Association of Tax Administrators, an opponent of the proposed § 306, argued that the legislation "would restrict the power of State Legislatures to classify property in order to carry out State policies such as provision for better land use, encouragement of location of industry, homestead tax relief and old-age property tax relief." S. Rep. No. 1483, *supra* note 14, at 8; S. Rep. No. 630, *supra* p. 17, at 8. As noted above, the resulting Senate Report made clear that, in determining whether tax rates were discriminatory, property traditionally classified as exempt "such as churches, charitable institutions, homesteads, and the

[29] For this reason, appellants question the correctness of the holding in ACF Industries, Inc. v. State of Arizona, 714 F.2d 93 (9th Cir. 1983), that business inventories exempted from *ad valorem* taxation may be excluded in calculating the average assessment required by 306 to be applied to railroad property. In many states, business inventories compose a large portion of the personal property tax base, and their exclusion from the comparison class would create significant discrimination against the property of interstate carriers.

like" was not intended to be considered as part of the comparison class. S. Rep. No. 630, *supra* p. 17, at 11.

The legislative history thus leads to the conclusion that both the assessment and tax rate provisions of bills proposed prior to the 4-R Act were intended to exclude from the comparison class only those special and limited classes of property which the states had traditionally exempted. Since the objective in both provisions was the same, the revision of the legislation during consideration of the 4-R Act to transfer the term "subject to a property tax levy", from the assessment provision to a definitional provision made sense.

Certainly that change cannot have been intended to create, suddenly and in the absence of any supporting legislative history, a major exception to the prohibition on discriminatory rates. Such an intent would not only have been at odds with the agreed purpose of the legislation, but would be totally inexplicable in light of the fact that Congress at the same time rejected the one limited exception which the Senate bill would have created, namely to allow for discrimination under state constitutional provisions.[30]

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[30] The Eighth Circuit in *Ogilvie* noted with regard to the 4-R Act: "Congress excluded agricultural property from the definition of commercial and industrial property, and could have excluded from the definition centrally assessed property or utilities or any other property it so desired. The fact is that it did not." Ogilvie v. Bd. of Equalization, 657 F.2d 204, 205 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). *See also* the court's conclusion in Atchison, T. & S. F. Ry. Co. v. Arizona, 559 F. Supp. 1237, 1246-47 (D. Ariz. 1983), that leased residential property should be included as commercial and industrial property

Differences between the rail and air carrier provisions: The foregoing conclusion is not altered by minor differences in language between § 1513(d) and § 306. The absence from § 1513(d) of the "catchall" provision found in § 306, prohibiting "any other [state] tax which results in discriminatory treatment of a common carrier by railroad" (49 U.S.C. § 11503(b)(4)), offers no support for the result reached by the South Dakota Supreme Court.[31] This catchall provision was not aimed at property taxes at all; the drafters and supporters of § 306 believed that the legislation prohibited all forms of property tax discrimination even before the catchall provision was added to the bill.[32]

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for comparison purposes:

> "A broad interpretation [of 'commercial and industrial property'] that focuses on the owner's use of the property is more consistent with the Congress' clear intent to measure discriminatory taxation and provide appropriate relief .... The 4-R Act is an attempt to establish uniformity between the tax rates of railroads and the 'hypothetical average taxpayer' .... *This intent to measure one taxpayer's burden against another applies equally to determine which taxpayers the railroads should be measured against. In this case, the proper taxpayers are those who use their property commercially as the railroads do.*" (Emphasis added.)

[31] The district court's reliance in *Ogilvie v. State Bd. of Equalization*, 492 F.Supp. 446 (D.N.D.), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 464 U.S. 1086 (1980), on the catchall provision seems not have been followed by the Eighth Circuit. *See supra* p. 26, n. 30. *But see* Trailer Train Co., v. State Bd. of Equalization, 710 F.2d 468, 472 (8th Cir. 1983), and Burlington N. R.R. Co. v. Bair, 766 F.2d 1222 (8th Cir. 1985).

[32] *Railroads—1975: Hearings Before the SubComm. on Surface Transportation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1837 (1975) (testimony of Stephen Ailes, President, Association of American Railroads).

The language was inserted only "three weeks before the statute's passage" and "represented a last minute realization by Congress that prohibiting only discriminatory property taxes would not be enough relief." *Richmond, F. & P. R.R. Co. v. Dep't of Taxation*, 762 F.2d 375, 380 (4th Cir. 1985). The provision instead was aimed at other taxes, such as a local gross receipts tax being imposed on the New York Dock Railway.[33] By contrast, § 1513(a), enacted prior to § 1513(d), already prohibited any state tax whatsoever on an airline's gross receipts.[34] *Aloha*, 464 U.S. at 10.[35]

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[33] *Id.* at 1883 (testimony of Stuart H. Johnson, Jr., Counsel for the New York Dock Railway).

[34] In addition, a catchall provision would have been inconsistent with § 1513(d)(3), which creates a limited exception from the statute for "in lieu" taxes "wholly utilized for airport and aeronautical purposes." The South Dakota court correctly rejected the state's argument that the flight property tax fell within that exception.

[35] Another minor difference between the statutes is the presence of the words "of the same type" in § 1513(d)(1)(A). The legislative history of § 1513(d) does not explain the origin of these words. It appears likely, however, that they were inserted to assure that taxation comparisons be made between like categories of property, *i.e.*, real with real, and personal with personal—a result already reached by the courts in applying the Motor Carrier Act. *See* Arkansas-Best Freight System, Inc. v. Lynch, 723 F.2d 365 (4th Cir. 1983); *see also* Arkansas-Best Freight System, Inc. v. Tax Div., Nos. 85-1368-69, slip op. at 9 (8th Cir. March 17, 1986) (available on LEXIS, Genfed library, Courts file). In any event, the meaning of the words is not in dispute in this proceeding.

CONCLUSION

For the foregoing reasons, the tax imposed by South Dakota on the flight property of airlines in interstate commerce violates § 7(d) of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513(d). The judgment of the Supreme Court of South Dakota sustaining that tax must, therefore, be reversed.

Respectfully submitted,

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April 30, 1986

APPENDIX

APPENDIX A

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Section 7(d) of the Airport Development Acceleration Act, of 1973, as added by § 532 of the Airport and Airway Improvement Act of 1982, 49 U.S.C., § 1513(d), provides:

§ 1513. State taxation of air commerce

* * * *

(d) Acts which unreasonably burden and discriminate against interstate commerce: definitions

(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection—

(A) "Assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "Commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

B. Pertinent portions of Title 10, South Dakota Codified Laws provide:

10-4-6.1 Exemption from taxation of personal property not centrally assessed—Taxes or fees in lieu unimpaired. Personal property as defined in 10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax.

10-6-33. Basis for determining valuation for tax purposes—Forced sale value not to be used. All property shall be assessed at its true and full value in money but not more than sixty percent of such assessed value shall be taken and considered as the taxable value of such property upon which the levy shall be made and applied and the taxes computed. * * *

10-6-34.1 Centrally assessed property classified Percentage of value at which equalized. Centrally assessed property is hereby classified for purposes of ad valorem taxation and shall be assessed and equalized as real and

personal property in the same proportion as was established in the respective taxing districts in the year 1977. Centrally assessed personal property shall be equalized at a percentage which is not greater than one hundred twenty-five percent of the percentage at which centrally assessed personal property was equalized at the same percentage as other real property in the county.

10-29-2. Department of revenue to assess flight property. Flight property of airline companies operating in this state shall be assessed by the department of revenue and not otherwise.

10-29-8. Annual assessment of flight property Information considered—Addition of omitted property. The department of revenue shall assess annually on the fifth day of July of each year all flight property of airline companies serving the state. In making such assessment, the department of revenue shall consider all the reports, facts, and information filed, with any other information obtainable, concerning the value of the flight property of airline companies and may add any property omitted from the return of such companies.

C. The Supremacy Clause of the United States Constitution (Art. VI, Clause 2) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX B

Determination of Tax Levied on Western Air Lines, Inc. for 1983*

Form 500—SECRETARY OF REVENUE

STATE OF SOUTH DAKOTA DEPARTMENT OF REVENUE

Secretary of Revenue

Capitol Lake Plaza Building Pierre, South Dakota
To be filed on or before June 1st.

ANNUAL REPORT

of

COMMERCIAL AIRLINE FLIGHT PROPERTY

Pursuant to South Dakota Statutes, SDCL 10-29 Commercial Air Flight Property Taxes are levied on or before the Fifth day of July. Notice of Assessment is sent the Company by the following July 20. The tax is payable January 1st following the levy and becomes delinquent May 1st next. Failure to send or receive the notice herein provided for or error in such notice shall not excuse the payment of the tax as required by this act.

* From Appendices A, B, & C to the Defendants' Brief to the South Dakota circuit court for the Sixth Judicial Circuit.

REPORT PERIOD FOR YEAR ENDING December 31st, 1982

Western Air Lines, Inc. Company	6060 Avion Drive Los Angeles, CA 90045 Address
Incorporated in State of Delaware	Date Company's Operation Began In South Dakota April 9, 1952

AFFILIATED OR CONTROLLING CORPORATION

Name	Address
None	Western Air Lines, Inc. P.O. Box 92005, WWPC Los Angeles, CA 90009

Tax Agent David L. Heiss, Mgr. Prop. Taxes Name
Los Angeles, CA 90009 Address

Western Air Lines, Inc.
South Dakota Flight Property Return
Aircraft Ready For Flight
For Year Ended December 31, 1982

Schedule 504-A
Page 1 of 2

Aircraft (O=Owned L=Leased) Type	Ship No.	Date of Manufacture	Aircraft Ready for Flight: Date Acquired	Cost	Percent Good*	Depreciated Cost
Boeing 727-200	(L) N2801W	10-16-69	Same as Col. (3)	$7,226,128	33.33%	$2,408,468
"	(L) N2802W	10-16-69	"	7,262,787	33.33%	2,420,687
"	(L) N2803W	10-16-69	"	7,223,054	33.33%	2,407,444
"	(L) N2804W	11-14-69	"	7,213,236	33.33%	2,404,172
"	(L) N2805W	11-14-69	"	7,292,855	33.33%	2,430,709
"	(L) N2806W	11-14-69	"	7,242,961	33.33%	2,414,079
"	(O) N2807W	5-12-72	"	8,186,625	33.33%	2,728,602
"	(O) N2808W	6-13-72	"	8,212,546	33.33%	2,737,242
"	(O) N2809W	6-16-72	"	8,270,894	33.33%	2,756,689
"	(O) N2810W	8-04-72	"	8,216,156	33.33%	2,738,445
"	(O) N2811W	8-16-72	"	8,227,530	33.33%	2,742,236
"	(O) N2812W	3-29-74	"	8,247,683	33.33%	2,748,953
"	(O) N2813W	4-06-74	"	8,246,670	33.33%	2,748,615
"	(O) N2814W	4-26-74	"	8,237,120	33.33%	2,745,432
"	(O) N2815W	5-29-74	"	8,239,603	33.33%	2,746,260
"	(O) N2816W	5-24-74	"	8,245,448	33.33%	2,748,208
"	(O) N2817W	6-05-74	"	8,359,635	33.33%	2,786,266
"	(O) N2818W	7-25-74	"	8,224,163	33.33%	2,741,114
"	(O) N2819W	5-23-75	"	8,554,285	33.33%	2,851,143
"	(O) N2820W	5-29-75	"	8,560,963	33.33%	2,853,369
"	(O) N2821W	6-02-75	"	8,561,097	33.33%	2,853,414

Western Air Lines, Inc.
South Dakota Flight Property Return
Aircraft Ready For Flight
For Year Ended December 31, 1982
(Continued)

Schedule 504-A
Page 1 of 2

Aircraft (O=Owned L=Leased) Type	Ship No.	Date of Manufacture	Aircraft Ready for Flight: Date Acquired	Cost	Pecent Good*	Depereciated Cost
Boeing 727-200	(L) N2822W	3-09-77	"	10,771,037	46.67%	5,026,843
"	(L) N2823W	3-09-77	"	10,752,752	46.67%	5,018,309
"	(L) N2824W	3-29-77	"	10,767,711	46.67%	5,025,291
"	(L) N2825W	5-03-77	"	10,755,269	46.67%	5,019,484
"	(L) N2826W	5-24-77	"	10,750,904	46.67%	5,017,447
"	(O) N2827W	12-15-77	"	10,620,878	46.67%	4,956,764
"	(O) N2828W	12-21-77	"	10,569,635	46.67%	4,932,849
"	(O) N2829W	6-20-78	"	11,371,652	53.33%	6,064,502
"	(O) N830WA	5-09-78	"	11,440,363	53.33%	6,101,146
"	(O) N831WA	5-31-78	"	11,356,714	53.33%	6,056,536
"	(O) N282WA	7-12-78	"	11,428,096	53.33%	6,094,604
"	(O) N283WA	7-13-78	"	11,425,185	53.33%	6,093,051
"	(O) N284WA	4-24-79	"	12,717,894	60.00%	7,630,736
"	(O) N286WA	5-01-79	"	12,711,253	60.00%	7,626,752
"	(O) N287WA	5-29-79	"	12,709,549	60.00%	7,625,729
"	(O) N288WA	6-07-79	"	12,713,031	60.00%	7,627,819
"	(O) N289WA	6-19-79	"	12,722,058	60.00%	7,633,235
"	(L) N831L	7-27-79	"	13,121,466	60.00%	7,872,880
"	(O) N290WA	3-05-80	"	12,739,055	66.67%	8,493,128
"	(O) N291WA	3-11-80	"	12,758,443	66.67%	8,506,054

*From Schedule 504B

Western Air Lines, Inc.
South Dakota Flight Property Return
Aircraft Ready For Flight
For Year Ended December 31, 1982

Schedule 504-A
Page 2 of 2

Aircraft (O=Owned L=Leased) Type	Ship No.	Date of Manufacture	Aircraft Ready for Flight: Date Acquired	Cost	Percent Good*	Depreciated Cost
Boeing 727-200	(O) N292WA	5-06-80	Same as Col. (3)	$ 13,184,977	66.67%	$ 8,790,424
"	(O) N293WA	5-09-80	"	13,185,770	66.67%	8,790,953
"	(O) N294WA	5-19-80	"	13,185,770	66.67%	8,790,953
"	(L) N295WA	5-29-81	"	15,707,466	73.33%	11,518,285
"	(L) N296WA	6-05-81	"	15,726,494	73.33%	11,532,238
"	(O) N297WA	5-22-81	"	14,223,095	73.33%	10,429,796
Total	727-200			$487,467,956		$244,287,355
Boeing 737-200	(O) N4502W	7-01-68	Same as Col. (3)	$ 3,686,838	33.33%	1,228,823
"	(O) N4505W	7-22-68	"	3,692,703	33.33%	1,230,778
"	(O) N4507W	8-16-68	"	3,481,028	33.33%	1,160,227
"	(O) N4509W	9-09-68	"	3,683,521	33.33%	1,227,718
"	(O) N4511W	9-30-68	"	3,699,435	33.33%	1,233,022
"	(O) N4512W	10-16-68	"	3,701,920	33.33%	1,233,850
"	(L) N4513W	10-18-68	"	3,692,953	33.33%	1,230,861
"	(L) N4514W	11-07-68	"	3,727,080	33.33%	1,242,236
"	(O) N4516W	12-09-68	"	3,705,474	33.33%	1,235,034
"	(O) N4518W	1-28-69	"	3,704,843	33.33%	1,234,824

Western Air Lines, Inc.
South Dakota Flight Property Return
Aircraft Ready For Flight
For Year Ended December 31, 1982
(Continued)

Schedule 504-A
Page 2 of 2

Aircraft (O=Owned L=Leased) Type	Ship No.	Date of Manufacture	Aircraft Ready for Flight: Date Acquired	Cost	Percent Good*	Depreciated Cost
Boeing 737-200	1-28-69	"	3,704,843	33.33%	1,234,824	
"	(O) N4520W	2-25-69	"	3,709,937	33.33%	1,236,522
"	(O) N4521W	2-22-69	"	3,728,851	33.33%	1,242,826
"	(L) N4569M	12-30-82	"	13,904,000	80.00%	11,123,200
"	(L) N4571M	12-30-82	"	15,000,000	80.00%	12,000,000
Total	737-200			$ 73,118,583		$ 37,859,921
Douglas DC-10-10	(O) N901WA	4-19-73	Same as Col. (3)	$ 22,042,377	33.33%	$ 7,346,724
"	(L) N902WA	6-12-73	"	21,043,127	33.33%	7,013,674
"	(L) N906WA	6-03-75	"	23,365,607	33.33%	7,787,757
"	(L) N907WA	6-22-76	"	26,286,147	40.00%	10,514,459
"	(O) N908WA	3-03-78	"	29,624,088	53.33%	15,798,526
"	(O) N909WA	5-18-78	"	29,874,487	53.33%	15,932,064
"	(O) N912WA	7-19-79	"	32,505,103	60.00%	19,503,062
"	(O) N913WA	7-26-79	"	33,556,195	60.00%	20,133,717
"	(O) N914WA	5-12-80	"	34,809,640	66.67%	23,207,587
"	(O) N915WA	6-05-80	"	34,808,300	66.67%	23,206,694
Total	DC-10-10			$287,915,071		$150,444,264
Douglas DC-10-30	(L) N821L	1-19-74	4-14-81	22,952,000	33.33%	$ 7,649,902
Total	All Aircraft			$871,453,610		$440,241,442

*From Schedule 504B

WESTERN AIR LINES, INC.
South Dakota Flight Property Report
Depreciation Table
December 31, 1982

Year of Acquisition	Age in Years	Schedule 504-B Percent Good
1982	1	80.00%
1981	2	73.33%
1980	3	66.67%
1979	4	60.00%
1978	5	53.33%
1977	6	46.67%
1976	7	40.00%
1975 & Prior	8	33.33%

Used for computing depreciated cost of aircraft as reported on Schedule 504-A.

Western Air Lines, Inc. **OPERATING STATISTICS** **December 31, 1982**

	Type of Equipment			
	Douglas DC-10-30	Douglas DC-10-10	Boeing 727-200	Boeing 737-200
SYSTEM				
Originating & Terminating Tonnage				
Passenger	27,043	222,579	1,142,091	296,503
Express	1,934	2,346	3,282	436
Freight	15,819	61,676	58,080	4,829
TOTAL	44,796	286,601	1,203,453	301,768
Airplane Hours In Flight	2,878	32,008	137,386	29,965
Revenue Ton Miles				
Passenger	20,607,522	271,803,018	516,585,588	80,262,551
Mail	2,066,987	9,218,045	23,716,611	1,803,598
Express	1,580,916	2,099,906	2,030,979	138,042
Freight	13,835,056	68,602,689	29,484,884	1,481,530
TOTAL	38,090,481	351,723,658	571,818,062	83,685,721
SOUTH DAKOTA				
Originating & Terminating Tonnage				
Passenger	-	-	2,859	21,874
Express	-	-	7	58
Freight	-	-	53	583
TOTAL	-	-	2,919	22,515
Airplane Hours In Flight	-	-	112	1,800
Revenue Ton Miles				
Passenger	-	-	520,887	4,494,612
Mail	-	-	7,820	131,733
Express	-	-	2,303	12,354
Freight	-	-	13,653	137,407
TOTAL	-	-	544,663	4,776,106

OPERATING STATISTICS
(Continued)

December 31, 1982

PERCENTAGE OF SYSTEM	Type of Equipment: Douglas DC-10-30	Douglas DC-10-10	Boeing 727-200	Boeing 737-200
Originating & Terminating Tonnage				
Passenger				
Express				
Freight				
TOTAL				
Airplane Hours In Flight	-	-	0.242%	7.461%
Revenue Ton Miles	-	-	0.082%	6.007%
Passenger				
Mail				
Express				
Freight				
TOTAL				
TOTAL PERCENT	-	-	0.095%	5.707%
AVERAGE PERCENT	-	-	0.419%	19.175%
	-	-	0.140%	6.392%

Western Air Lines
December 31, 1982

1983 South Dakota Flight Property Tax Return
Originating and Terminating Tonnage South Dakota
Year Ended December 31, 1982

Schedule 506

	Passenger	Freight	Express	Total	Per Cent
Pierre (Hughes)	4,219	100	7	4,326	17.009%
Rapid City (Pennington)	6,767	299	23	7,089	27.872%
Sioux Falls (Minnehaha)	13,747	237	35	14,019	55.119%
Total South Dakota	24,733	636	65	25,434	100.000%

1983-Western Airlines Inc.-1983

		Original Cost Cost	Depreciated Cost	Allocation Factor	Full & True Value
B 727-200		487,467,956	244,287,355	.00140	342,002
B 737-200		73,118,583	37,859,921	.06392	2,420,006
					2,762,008

		B 727-200		B 737-200	
Tonnage	S.D.	2,919	.242	22,515	72461
	System	1,203,453		301,768	
Hours	S.D.	112	.082	1,800	6.007
	System	137,386		29,965	
Rev. Ton Miles	S.D.	544,663	.095	4,776,106	5.707
	System	571,818,062		83,685,721	
Total of three factors			.419		19.175
Average of three factors			.140		6.392

County	Allocation Factor	Full & True Value
Hughes	17.009	469,790
Pennington	27.872	769,827
Minnehaha	55.119	1,522,391
		2,762,008

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COMPANY	TRUE & FULL VALUE	TAXABLE	AVERAGE MILL RATE	TOTAL TAX
FRONTIER	1,579,442.00	740,758.00	54.35	40,260.20
CONTINENTAL	160,000.00	96,000.00	54.35	5,217.60
REPUBLIC	1,627,161.00	856,048.00	54.35	46,526.21
UNITED	131,262.00	78,757.00	54.35	4,280.44
OZARK	449,123.00	269,474.90	54.35	14,645.91
WESABA	210,557.00	104,014.00	54.35	5,653.16
WESTERN	2,762,008.00	1,432,772.00	54.35	77,871.16
TOTALS	6,919,553.00	3,577,823.00	54.35	194,454.68

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COMPANY		LOCATION OF AIRPORT	ALLOC % TAX	25%	75%	TOTAL TAX
FRONTIER		Rapid City	65.5%	5,032.52	19,777.83	24,810.35
		Sioux Falls	34.5%	5,032.52	10,417.33	15,449.85
	TOTALS		100.0%	10,065.04	30,195.16	40,260.20
REPUBLIC		Aberdeen	17.37%	2,326.31	6,061.20	8,387.51
		Rapid City	19.62%	2,326.31	6,846.33	9,172.64
		Sioux Falls	55.75%	2,326.31	19,453.77	21,780.08
		Watertown	6.73%	2,326.31	2,348.41	4,674.72
		Yankton	0.53%	2,326.31	184.95	2,511.26
	TOTALS		100.00%	11,631.55	34,894.66	46,526.21
WESTERN		Pierre	17.01%	6,489.26	9,934.42	16,423.68
		Rapid City	27.87%	6,489.26	16,277.02	22,766.28
		Sioux Falls	55.12%	6,489.26	32,191.94	38,681.20
	TOTALS		100.0%	19,467.78	58,403.38	77,871.16
MESABA		Brookings	32.14%	471.10	1,362.69	1,833.79
		Huron	47.10%	471.10	1,996.97	2,468.07
		Mitchell	20.76%	471.10	880.20	1,351.30
	TOTALS		100.00%	1,413.30	4,239.86	5,653.16
OZARK						
TOTALS		Sioux Falls	100.00%	3,661.48	10,984.43	14,645.91
CONTINENTAL	TOTALS	Rapid City	100.00%	1,304.40	3,913.20	5,217.60
UNITED	TOTALS	Sioux Falls	100.00%	1,070.11	3,210.33	4,280.44
				48,613.66	145,841.02	194,454.00

1983-County Distribution of Air Flight Property Tax-1983

COUNTY	COMPANY	AIRPORT	25%	75%	TO COMPANY 100%	TOTAL TAX
BEADLE	MESABA	Huron	471.10	1,996.97	47.10%	2,468.07
BROOKINGS	MESABA	Brookings	471.10	1,362.69	32.14%	1,833.79
BROWN	REPUBLIC	Aberdeen	2,326.31	6,061.20	17.37%	8,387.51
CODINGTON	REPUBLIC	Watertown	2,326.31	2,348.41	6.73%	4,674.72
DAVISON	MESABA	Mitchell	471.10	880.20	20.76%	1,351.30
HUGHES	WESTERN	Pierre	6,489.26	9,934.42	17.01%	16,423.68
YANKTON	REPUBLIC	Yankton	2,326.31	184.95	0.53%	2,511.26
MINNEHAHA	FRONTIER	Sioux Falls	5,032.52	10,417.33	34.50%	15,449.85
	REPUBLIC	Sioux Falls	2,326.31	19,453.77	55.75%	21,780.08
	OZARK	Sioux Falls	3,661.48	10,984.43	100.00%	14,645.91
	UNITED	Sioux Falls	1,070.11	3,210.33	100.00%	4,280.44
	WESTERN	Sioux Falls	6,489.26	32,191.94	55.12%	36,681.20
TOTAL MINNEHAHA COUNTY			18,579.68	76,257.80		94,837.48
PENNINGTON	FRONTIER	Rapid City	5,032.52	19,777.83	65.50%	24,810.35
	REPUBLIC	Rapid City	2,326.31	6,486.33	19.62%	9,172.64
	WESTERN	Rapid City	6,489.26	16,277.02	27.87%	22,766.28
	CONTINENTAL	Rapid City	1,304.40	3,913.20	100.00%	5,217.60
TOTAL PENNINGTON COUNTY			15,152.49	46,814.38		61,966.87
GRAND TOTAL			48,613.66	145,841.02		194,454.68

APPENDIX C

CHANGES IN CORPORATE AFFILIATIONS

The following changes have occurred since the appellants' corporate affiliations were listed at p. i of the Jurisdictional Statement:

a. Peoples Express Airline has completed its acquisition of Frontier Holdings, Inc., parent of appellant Frontier Airlines, Inc.

b. Appellant Republic Airlines, Inc. has agreed to be acquired by NWA, Inc., parent of Northwest Airlines, Inc.

c. Ozark Holdings, Inc., parent of appellant Ozark Air Lines, Inc., has agreed to be acquired by Trans World Airlines, Inc.